



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2017-0371; FRL-9991-47-Region 4]

Air Plan Approval; Alabama: PSD Replacement Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the Alabama State Implementation Plan (SIP), submitted by the State of Alabama, through the Alabama Department of Environmental Management (ADEM), via two letters dated May 7, 2012, and August 27, 2018. The proposed SIP revisions relate to the State's Prevention of Significant Deterioration (PSD) permitting regulations. In particular, the revisions add a definition of "replacement unit" and provide that a replacement unit is a type of existing emissions unit under the definition of "emissions unit." This action is being taken pursuant to the Clean Air Act (CAA or Act).

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2017-0371 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information

you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Andres Febres, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Mr. Febres can be reached via telephone at (404) 562-8966, or via electronic mail at febres-martinez.andres@epa.gov.

SUPPLEMENTARY INFORMATION:

I. What Action is EPA Taking?

EPA is proposing to approve changes to the Alabama SIP that were provided to EPA through two letters dated May 7, 2012, and August 27, 2018.¹ Specifically, EPA is proposing to approve two SIP revisions that include changes to Alabama's PSD permitting regulations as part of the State's New Source Review (NSR) permitting program, found in ADEM Administrative Code Rule 335-3-14-.04 – *Air Permits Authorizing Construction in Clean Air Areas [Prevention*

¹ EPA notes that the Agency received the SIP revisions on May 16, 2012 and September 4, 2018.

of Significant Deterioration Permitting (PSD)].²

Alabama's May 7, 2012, SIP revision changes the PSD regulations at Rule 335-3-14-.04 by adding a definition of "replacement unit" and by modifying the definition of "emissions unit" to expressly include replacement units as existing emissions units. Portions of this submittal were later withdrawn through a May 5, 2017, letter, discussed in Section III below. Alabama's August 27, 2018, SIP revision makes further changes to ADEM's PSD regulations by adding a fifth condition to the new definition of a "Replacement Unit" added in the May 7, 2012, SIP revision.³

II. Background

As mentioned in Section I above, on May 7, 2012, Alabama submitted several changes to Rule 335-3-14-.04, with some changes withdrawn through a May 5, 2017, withdrawal letter. On August 24, 2017 (82 FR 40072 and 82 FR 40085), EPA published a direct final rule, together with a simultaneous proposal, to approve these changes into the Alabama SIP. Due to the receipt of adverse comments, EPA withdrew the direct final rule on October 12, 2017 (82 FR 47397)

² EPA's regulations governing the implementation of the NSR permitting programs are contained in 40 CFR sections 51.160 through 51.166; 52.21, 52.24; and part 51, Appendix S. The CAA NSR program is composed of three separate programs: PSD, nonattainment new source review (NNSR), and Minor NSR. PSD is established in part C of title I of the CAA and applies in areas that meet the NAAQS – "attainment areas" – as well as areas where there is insufficient information to determine if the area meets the NAAQS – "unclassifiable areas." The NNSR program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS – "nonattainment areas." The Minor NSR program addresses construction or modification activities that do not qualify as "major" and applies regardless of the designation of the area in which a source is located. Together, these programs are referred to as the NSR programs.

³ EPA is not taking action on the portions of Alabama's May 7, 2012, and August 27, 2018, submittals regarding ADEM Administrative Code Chapter 335-3-10 – *Standards of Performance for New Stationary Sources*, and Chapter 335-3-11 – *National Emission Standards for Hazardous Air Pollutants*. In the cover letter for these SIP revisions, Alabama acknowledges that these regulations are not part of Alabama's SIP and states that these regulations are not to be incorporated into the SIP.

and is not taking final action on the August 24, 2017, proposed rule.⁴

Rather, through this proposed rulemaking, EPA is re-proposing action on the changes to Rule 334-3-14-.04, as provided in Alabama's May 7, 2012, SIP revision (with the exception of portions withdrawn by the State through the May 5, 2017, withdrawal letter), together with the additional changes provided in Alabama's August 27, 2018, SIP revision.⁵ The following paragraphs contain background information related to the action being proposed. Section III contains EPA's analysis of the state submittals, as well as the rationale for proposing to approve the changes previously mentioned.

A. *NSR Reform*

On December 31, 2002 (67 FR 80186) (hereinafter referred to as the 2002 NSR Rule), EPA published final rule revisions to the CAA's PSD and NNSR programs. The revisions included several major changes to the NSR program, including the addition of an actual-to-projected-actual emissions test for determining NSR applicability for existing emissions units.

Following publication, EPA received numerous petitions requesting reconsideration of several aspects of the final rule. On July 30, 2003 (68 FR 44624), EPA granted reconsideration on six issues, including whether replacement units should be allowed to use the actual-to-

⁴ In a direct final rule, EPA approves changes to a state's implementation plan without prior proposal because the Agency views the changes as noncontroversial and anticipates no adverse comments. However, in the proposed rule section of the Federal Register publication, EPA simultaneously publishes a separate document that serves as the proposed approval for the direct final rule. In the direct final rule, the Agency states that the rule will be effective 60 days from the date of publication unless adverse comments are received within 30 days of publication. If such comments are received, EPA would publish a document withdrawing the direct final rule, while keeping the proposed rule in place, and would inform the public that the rule will not take effect. The Agency could then address all adverse comments in a subsequent final rule, based on the proposed rule. Alternatively, the Agency could issue a re-proposal, which is the approach taken in this proposed rulemaking.

⁵ Because this rulemaking is re-proposing approval of the changes, EPA is not responding to the comments received on the August 24, 2017, direct final rule and proposed rulemaking actions. With this new proposed rulemaking, EPA is establishing a new 30-day comment period and will respond to any comments received during that time.

projected-actual applicability test to determine whether installing a replacement unit results in a significant emissions increase. On November 7, 2003 (68 FR 63021), EPA published a rule titled rule titled “Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Reconsideration.” *See* 68 FR 63021 (November 7, 2003) (hereinafter referred to as the NSR Reform Reconsideration Rule). In the Reconsideration Rule, EPA continued to allow the owner or operator of a major stationary source to use the actual-to-projected-actual applicability test to determine whether installing a replacement unit results in a significant emissions increase. Concurrently, EPA also modified the rules by: 1) adding a definition of “replacement unit,” and 2) revising the definition of “emissions unit” to clarify that a replacement unit is considered an existing emissions unit and therefore is eligible for the actual-to-projected-actual test for major NSR applicability determinations. The 2002 NSR Rule and the NSR Reform Reconsideration Rule are hereinafter collectively referred to as the “2002 NSR Reform Rules,” and are codified at 40 CFR 51.165, 51.166, and 52.21.

B. Equipment Replacement Provision

Under Federal regulations, certain activities are not considered to be a physical change or a change in the method of operation at a source, and thus do not trigger NSR review. One category of such activities is routine maintenance, repair and replacement (RMRR). On October 27, 2003 (68 FR 61248), EPA published a rule titled “Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion” (hereinafter referred to as the ERP Rule). The ERP Rule provided criteria for determining whether an activity falls within the RMRR exemption. The ERP Rule provided a list of equipment replacement activities that are

exempt from NSR permitting requirements, while ensuring that industries maintain safe, reliable, and efficient operations that will have little or no impact on emissions. Under the ERP Rule, a facility undergoing equipment replacement would not be required to undergo NSR review if the facility replaced any component of a process unit with an identical or functionally equivalent component. The rule included several modifications to the NSR rules to explain what would qualify as an identical or functionally equivalent component.

Shortly after the October 27, 2003, rulemaking, several parties filed petitions for review of the ERP Rule in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The D.C. Circuit stayed the effective date of the rule pending resolution of the petitions. A collection of environmental groups, public interest groups, and States, subsequently filed a petition for reconsideration with EPA, requesting that the Agency reconsider certain aspects of the ERP Rule. EPA granted the petition for reconsideration on July 1, 2004 (69 FR 40278).⁶ After the reconsideration, EPA published its final response on June 10, 2005 (70 FR 33838), which stated that the Agency would not change any aspects of the ERP. On March 17, 2006, the D.C. Circuit acted on the petitions for review and vacated the ERP Rule.⁷

III. Analysis of State's Submittal

Alabama's May 7, 2012, SIP revision makes changes to the State's PSD permitting regulations by adding a definition of "replacement unit" at Rule 335-3-14-.04(2)(bbb) and by modifying the definition of "emissions unit" at Rule 335-3-14-.04(2)(g) to expressly include

⁶ The reconsideration granted by EPA opened a new 60-day public comment period, including a new public hearing, on three issues of the ERP: (1) the basis for determining that the ERP was allowable under the CAA; (2) the basis for selecting the cost threshold (20 percent of the replacement cost of the process unit) that was used in the final rule to determine if a replacement was routine; and (3) a simplified procedure for incorporating a Federal Implementation Plan into State Plans to accommodate changes to the NSR rules.

⁷ *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006)

replacement units as existing emissions units. These changes were intended to reflect revisions to the Federal regulations regarding replacement units included in the NSR Reform Reconsideration Rule and to reflect revisions regarding functionally equivalent components in the ERP Rule, as described in Sections II.A and II.B of this action, above.

The SIP revision initially sought to add a definition of “replacement unit” at Rule 335-3-14-.04(2)(bbb) that combined the Federal definition of “replacement unit” with language concerning functionally equivalent units and basic design parameters from the ERP Rule, but the language from the ERP Rule was vacated.⁸ Accordingly, on May 5, 2017, Alabama submitted a letter to EPA withdrawing the portions of the definition of “replacement unit” from Rule 335-3-14-.04(2)(bbb), which corresponded to the vacated language of the ERP Rule.

Alabama withdrew all language related to the ERP Rule, with the exception of one sentence in subparagraph (bbb)(3) that provides an example of what should be considered a “basic design parameter” as it relates to a replacement unit. EPA has evaluated the sentence, which states that “basic design parameters of a replaced unit shall also include all source specific emission limits and/or monitoring requirements.” The Agency believes that this language is simply an illustrative example of what shall be considered and that it does not change how Alabama’s PSD regulations operate. Alabama’s provisions relating to RMRR remain consistent with Federal provisions and the CAA regarding RMRR and therefore remain as stringent as the Federal PSD regulations under 40 CFR 51.166.

⁸ As mentioned in Section II of this rulemaking, the ERP rule was vacated by the D.C. Circuit on March 17, 2006. However, the ERP rule was previously stayed indefinitely, on December 24, 2003. EPA has not taken action to remove the language of the ERP rule from the federal NSR regulations (including language found at 40 CFR 51.165, 51.166, and 52.21), but a note remains stating that the language is stayed indefinitely, and that the stayed provisions will become effective immediately if the court terminates the stay.

Additionally, on August 27, 2018, Alabama submitted a supplemental SIP revision that further modifies the definition of “replacement unit” proposed for adoption in the May 7, 2012, SIP revision, by adding a fifth condition under subparagraph (bbb)(5). The additional fifth condition requires replacement units, as defined under Rule 335-3-14-.04(2)(bbb), to use the “Actual-to-projected actual” test for determining PSD applicability under subparagraph (1)(f) of the same rule. New rule 335-3-14-.04(2)(bbb) would read as follows:

(bbb) Replacement unit means an emissions unit for which all the criteria listed in subparagraphs (2)(bbb)1. through 4. of this section are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced. A replacement unit is subject to all permitting requirements for modifications under this rule.

1. The emissions unit is a reconstructed unit within the meaning of 40 CFR §60.15(b)(1), or the emissions unit completely takes the place of an existing emissions unit.
2. The emissions unit is identical to or functionally equivalent to the replaced emissions unit.
3. The replacement does not alter the basic design parameters of the process unit. Basic design parameters of a replaced unit shall also include all source specific emission limits and/or monitoring requirements.
4. The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation

by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

5. A Replacement Unit as defined in this subparagraph shall be subject to the applicability test in subparagraph (1)(f) of this rule for any modification.

The adoption of Rule 335-3-14-.04(2)(bbb), is meant to adopt into Alabama's PSD regulations, provisions regarding replacement units that are part of the Federal PSD regulations. These provisions were put in place by the NSR Reform Reconsideration Rule and are part of the RMRR provisions. Although the RMRR provisions related to replacement units were modified by the ERP Rule, these amendments were vacated by the D.C. Court, and Alabama appropriately withdrew these vacated elements. By adopting rule 335-3-14-.04(2)(bbb), as shown above, Alabama's PSD regulations would be consistent with Federal provisions and the CAA regarding RMRR.

In addition to adopting Rule 335-3-14-.04(2)(bbb) as presented above which excludes the portions withdrawn by the state and includes the addition of subparagraph (bbb)5, the May 7, 2012, SIP revision includes changes to Rule 335-3-14-.04(2)(g). Specifically, Alabama revises the definition of "Emissions Unit" in 335-3-14-.04(2)(g) by adding a new sentence at subparagraph (g)2. that expressly states that "A replacement unit, as defined in subparagraph (bbb) of this rule is an existing emissions unit.". This sentence references the new definition of "replacement unit" at Rule 335-3-14-.04(2)(bbb), as presented above, and is consistent with the Federal definition of the term "replacement unit" at 40 CFR 52.21(b)(33). Based on the change proposed in the May 7, 2012, SIP revision, Rule 335-3-14-.04(2)(g) would read as follows:

(g) “Emissions Unit” shall mean any part of a stationary source which emits or would have the potential to emit any regulated NSR pollutant including an electric utility steam generating unit as defined in subparagraph (2)(vv) of this rule. For purposes of this rule, there are two types of emissions units as described in subparagraphs (2)(g) 1. and 2. of this rule.

1. A new emissions unit is any emissions unit that is (or will be) newly constructed and that has existed for less than 2 years from the date such emissions unit first operated.
2. An existing emissions unit is any emissions unit that does not meet the requirements of subparagraph (2)(g)1. of this rule. A replacement unit, as defined in subparagraph (bbb) of this rule, is an existing emissions unit.

EPA has preliminarily concluded that these changes to Rule 335-3-14-.04(2)(g) and the adoption of Rule 335-3-14-.04(2)(bbb) will not interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of the CAA. The aforementioned changes align Alabama’s PSD regulations regarding replacement units, which are found at Rule 335-3-14-.04, with the Federal PSD regulations. Therefore, EPA is proposing to approve these changes into the Alabama SIP.

IV. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is

proposing to incorporate by reference ADEM Administrative Code Rule 335-3-14-.04(2)(g) and 335-3-14-.04(2)(bbb), which add a definition of “replacement unit” and provide that a replacement unit is a type of existing emissions unit under the definition of “emissions unit,” state effective on October 5, 2018. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 4 office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information).

V. Proposed Action

EPA is proposing to approve changes to the Alabama SIP, that were provided to EPA through Alabama’s May 7, 2012, SIP revision, with the exception of portions that were withdrawn in the May 7, 2017, withdrawal letter, as well as changes provided to EPA through Alabama’s August 27, 2018, SIP revision. Specifically, EPA is proposing to approve changes to ADEM Administrative Code Rule 335-3-14-.04(2)(g), as well as new Rule 335-3-14-.04(2)(bbb), as described above, in order to make Alabama’s PSD program consistent with Federal provisions and the CAA regarding RMRR. This action is limited to the two rules currently before the Agency and does not modify any other PSD rules in Alabama’s SIP.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. This action merely proposes to approve state

law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: March 18, 2019.

Mary S. Walker,
Acting Regional Administrator,
Region 4.

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